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No. 811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

F. W. WOOLWORTH CO.,

Petitioner,

vs.

HENRI A. MEIS, Trustee Under Agreement Dated December 26, 1945, and Known as the Blanche Meis Trust,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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F. W. Woolworth Co. petitions this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *F. W. Woolworth Co.* v. *Henri A. Meis, Trustee Under Agreement Dated December 26, 1945, and Known as the Blanche Meis Trust*, No. 13670.

OPINIONS BELOW.

The majority opinion and dissent of the United States Court of Appeals appear as Appendix A hereto, pages App. 1 to App. 10, and is reported at 310 F. 2d 350. The opinion of the United States District Court for the Eastern District of Illinois is not reported but appears as Appendix B hereto, pages App. 11 to App. 20.

JURISDICTIONAL STATEMENT.

The opinion and judgment below were filed and entered on October 22, 1962. A petition for rehearing was denied November 20, 1962. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED.

1. Did the federal court, in an action based upon diversity of citizenship, overrule Illinois law as set forth in *Kaufman* v. *Shoe Corporation of America*, 24 Ill. App. 2d 431, 164 N.E. 2d 617, (Appellate Court of Illinois, 3d Dist. 1960, Appendix C hereto, App. 21 to App. 28)?

STATEMENT OF THE CASE.

On July 1, 1953, F. W. Woolworth Co. (hereinafter referred to as "Woolworth") leased premises in Danville, Illinois, from Henri A. Meis, Trustee (hereinafter referred to as "Meis"), for use as a retail variety store for a 25-year term. (R. 6-7)*

In 1953, the premises were heated by steam supplied from the Illinois Power Company, a public utility. (R. 42)

During negotiations, the landlord rejected a lease draft tendered by Woolworth containing its standard printed provision obligating the landlord to supply heat at a fixed temperature during the heating season. (R. 64). A representative of the landlord testified that (R. 63):

> "Well, it seemed to me it was a quite lengthy one [conference] . . .; but we did finally get down to this heating clause, the standard clause that was printed in there, and we said we could not agree to that; that it was objectionable to us, that we didn't want to have any obligation to furnish heat."

The possibility of the utility discontinuing service was not discussed during the negotiations. (R. 43) Woolworth never stated it would install a heating unit if one became necessary. The landlord admitted that Woolworth was not asked to assume this responsibility or told it would have this obligation. (R. 43) There is no lease provision relating to the obligation to furnish a source of heat. The only heat provision is contained in Article 18. (R. 17):

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* References to "R" in this petition are to the printed copies of the Appendix to the record used in the Court of Appeals.

"The Landlord agrees at Landlord's expense to install and connect an adequate separate meter for the purpose of measuring all steam for heat consumed by the Tenant in the demised premises. The Tenant agrees to purchase and pay for the steam indicated by said meter to have been consumed by the Tenant from the public utility to which the demised premises are connected."

On June 17, 1957, the Illinois Power Company notified Woolworth that it had been granted permission by the Illinois Commerce Commission to discontinue steam heat service in Danville effective June 1, 1960. (R. 3, 27) Without heat, the premises are not suitable for use as a retail store. (R. 30) A heating unit was installed in 1960 at a cost of $14,565.58. By stipulation, the installation was without prejudice to the present litigation. (R. 4, 29-30)

Illinois Law Relating to the Duty to Provide a Source of Heat.

There is no Illinois statute or local ordinance relating to the duty to furnish a source of heat. A single Illinois decision considers the obligation to supply a source of heat where the utility discontinues service.

In *Kaufman v. Shoe Corporation of America*, 24 Ill. App. 2d 431, 164 N.E. 2d 617, Appendix C, App. 21 to App. 28 (3d Dist. 1960), store premises in Champaign, Illinois, were leased for a 25-year term commencing in 1952 at a rental of $20,000 per year. There was no lease provision relating to heat. The store was heated with steam purchased directly by the tenant from Illinois Power Company. In 1959, the utility discontinued service in Champaign. The parties installed a heating unit pursuant to written stipulation pending outcome of the landlord's declaratory judgment action.

In *Kaufman*, the Appellate Court noted that the basic question whether the tenant was obligated to install the heating equipment under the terms of the lease, was without precedent in Illinois.

The *Kaufman* landlord argued that the tenant's obligation to install the heating equipment was covered by the tenant's covenant to keep the premises in good repair. The Appellate Court held that the word "repair," strictly construed, did not include alterations or additions and hence, the installation of new heating equipment could not be classified as either a "repair" or "structural repair." The Appellate Court said (App. 24):

> "A general covenant of the tenant to repair, or to keep the premises in repair, merely binds him to make the ordinary repairs reasonably required to keep the premises in proper condition; it does not require him to make repairs involving structural changes. In order to shift on the tenant a burden which would naturally fall on the landlord, the warrant for the change should be plainly discoverable in the lease. 51 C.J.S., Landlord and Tenant, Sec. 368.
>
> Where a tenant covenants merely to repair and the alterations or additions to the premises are of a structural or substantial nature and are made necessary by extraordinary or unforeseen future events not within the contemplation of the parties at the time the lease was executed, the landlord is ordinarily held liable for such alterations or additions."

The Appellate Court held that the landlord should install all heating equipment.

No petition for leave to appeal to the Supreme Court of Illinois was filed. When the case at bar was heard and decided in both the District Court and Court of Appeals, the *Kaufman* case was, and now remains the last word of

the Illinois courts on the subject. No subsequent decisions have cited or attempted to construe it, except the case at bar.

In the 1960 Annual Survey of American Law, 36 N.Y.U.L. Rev. 394, the *Kaufman* decision received favorable comment.

Proceedings Below.

On January 23, 1961 Woolworth filed a declaratory judgment action against Meis in the United States District Court for the Eastern District of Illinois seeking a determination that Meis had the obligation to provide a source of heat in the premises and seeking reimbursement for the $14,565.58 expenditure. The jurisdiction of the federal court was invoked on the basis of the diversity of citizenship of the parties.

The District Court, sitting without a jury, heard evidence and entered a judgment in favor of the defendant.

The United States Court of Appeals, Circuit Judge Swygert dissenting, affirmed the District Court. The majority opinion attempted to distinguish the *Kaufman* case on the ground that the evidence of intention rendered inapplicable the otherwise undisputed Illinois rule that the landlord is liable. (App. 4-5)

ARGUMENT.

THE MAJORITY OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH ILLINOIS LAW AS SET FORTH IN THE KAUFMAN CASE ON THE IMPORTANT QUESTION WHETHER ILLINOIS LAW IMPOSES UPON THE LANDLORD OR THE TENANT THE BURDEN OF UNFORESEEN STRUCTURAL ADDITIONS TO THE LEASED PREMISES.

In *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945) this Court stated:

> "*Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. . . . The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

If the decision of the court below is allowed to stand, an Illinois litigant seeking a determination of whether the landlord or the tenant must bear the burden of unforeseen structural additions to the leased premises will hereafter get a diametrically opposite result depending on whether the state or federal forum is selected.

By the *Kaufman* case, the burden of providing a source of heat where the outside utility discontinues service was placed squarely upon the landlord, absent an express cov-

enant to the contrary or a warrant for a change in this rule of liability that is "plainly discoverable."

In the case at bar, the burden of providing a source of heat where the outside utility discontinues service is placed squarely upon the tenant. The purported justification for this inversion of established and undisputed Illinois law is the landlord's refusal, during preliminary negotiations, to accede to the tenant's request that the landlord establish the customer relation with the utility.

The pivotal fact in the *Kaufman* case, however, was that the failure of utility service was unforeseen when the lease was negotiated. No provision had been made for the contingency. In the case at bar, the same essential facts are present. It is admitted that no consideration was given during negotiations to the possibility that the utility might discontinue service. No lease clause covered the obligation of the parties.

Circuit Judge Swygert could find no basis in his dissent to distinguish the holding of the *Kaufman* case. (App. 6-10)

What is the state of Illinois law now?

Under Illinois law as decided by the Illinois courts, a landlord who does not assume any obligation to supply either heat or a source of heat at the time the lease is negotiated, has the duty to supply a heating unit where the public utility with which the tenant contracted obtains permission to terminate service. Under Illinois law, as decided by the federal court, a landlord who is asked to supply heat but refuses because there is a utility supplying heat has no such obligation. This will be true even though the utility failure never was discussed during negotiations and no lease clause purports to cover the con-

tingency. The distinction is completely without substance and contrary to the clear intent of the Appellate Court of Illinois which said "in order to shift on the tenant a burden which would naturally fall on the landlord, the warrant for the change should be plainly discoverable in the lease." (App. 24)

The language of the court in *Yoder* v. *Nu-Enamel Corporation*, 117 F. 2d 488 (8th Cir. 1941), is appropriate here (p. 489):

> "Indeed, under the implications of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, and *West* v. *American Telephone and Telegraph Co.*, 61 S. Ct. 179, 85 L. Ed. 139, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

CONCLUSION.

Erie v. *Tompkins* enjoins the federal court both from overruling State Court decisions and from evading their clear implication. In the case at bar the effect of the federal court's decision is to decide an important state question in a way in conflict with applicable state law, to place upon the tenant a burden Illinois law imposes on the landlord, and to make the choice of forum the pivotal factor in determining the substantive rights of the parties in future litigation. We submit that this case is worthy of this Court's consideration, and the exercise of its supervisory powers, and we ask the Court to exercise its discretion in favor of issuing its writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and thereafter reviewing and reversing the decision of that Court.

Respectfully submitted,

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February 11, 1963.

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit filed October 22, 1962, reported at 310 F. 2d 350:

Before HASTINGS, *Chief Judge*, and KILEY and SWYGERT, *Circuit Judges*.

KILEY, *Circuit Judge*.

This is a diversity declaratory judgment suit by the tenant, Woolworth, for a declaration that defendant landlord was bound under a lease to pay the cost of installation of a heating unit made necessary by discontinuance of the previous heating system. The court, without a jury, decided against Woolworth and it has appealed.

For many years prior to 1953, Woolworth rented from the landlord the first floor of the Daniels building and connected basement space of the adjoining Milner Hotel in Danville, Illinois. The Illinois Power Company furnished steam heat to both buildings. Woolworth paid for its share of the steam, measured by a meter installed by the landlord. In March, 1953, the hotel building was partially destroyed by fire, and the Daniels building suffered minor damage.

The lease in question was made July 1, 1953, for a term of twenty-five years, covering the first floor of the Daniels building and the first floor of the hotel.

Woolworth, under Article 15[1] of the lease, substantially

[1] Woolworth agreed to make, at its expense, "such alterations, additions and changes * * * as it deems necessary or convenient to fit the same for its occupancy * * * ." The agreement covered extensive structural alterations, virtual reconstruction of the hotel building, and included among other specific things "year around air conditioning and ventilation."

rebuilt the leased premises. The Power Company continued to furnish steam heat and Woolworth continued paying its share of the cost. In 1957, the Power Company notified Woolworth that, with permission of the Illinois Commerce Commission, distribution of steam would be discontinued effective June 1, 1960. Shortly thereafter, Woolworth installed a heating unit at a cost of $14,565.58.[2] Its suit is for a declaration that the landlord has the burden of the cost of that unit.

The District Court decided that the landlord had no obligation to install and pay for the heating plant. Woolworth claims the court erred in finding that the parties intended that the landlord should not have that duty; and in refusing to apply Illinois law in its favor.

It is agreed that the principle of decision in this case is the intention of the parties. Although Woolworth seeks to confine the basis for determining that intent to the lease itself, it introduced testimony of the negotiations between the parties, and the testimony was relied on by the District Court in determining the question of intention.

The evidence submitted by both parties is that twice in Woolworth's preliminary drafts of the lease, its "superintendent of real estate"[3] submitted a proposal that the landlord furnish, at landlord's expense, seventy-two degree heat from September 15 to May 15 each year, and that twice the landlord refused to accept the provision. The result was Article 18 of the lease which provided for continuation of the preexisting arrangement under which the Power Company furnished the heat, paid for by Wool-

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[2] Said installation was pursuant to a stipulation between the parties that it would be without prejudice to the present litigation.

[3] He had charge of Woolworth's leases of over two hundred locations in three states.

worth, and the landlord installed and connected the meter. Testimony for the landlord was that this change in the preliminary drafts was to avoid the heating obligation. There was also testimony that Woolworth's preliminary draft sought to put on the landlord the obligation "to make and pay for all necessary repairs to the heating plant." That provision was "unacceptable" to the landlord and was not in the final draft of the lease. There is testimony too that Woolworth's superintendent of real estate and his predecessor, in memoranda, construed the lease as imposing no greater burden of heating than the landlord previously had, and that Woolworth had the burden of maintaining "the heating plant."

The court inferred from the foregoing substantial evidence that the landlord had refused to be obligated for the heating; that the landlord's state of mind was known to Woolworth; that it drew the lease in the light of that knowledge; and that the provisions of the final draft reflected the landlord's state of mind. We think the inferences are not clearly erroneous.

Based on those inferences, the District Court concluded that the parties did not intend that landlord should have the duty of installing or paying for the heating plant. We see no error in this conclusion. It was unnecessary for the court to find, as argued by Woolworth, that the parties "formulated" a mutual intention with respect to future heating. It was enough if there was substantial evidence that the landlord expressed the intention not to be bound and that Woolworth's conduct implied the intention that the landlord was not to be bound.

We see no merit to the argument that the court should have found that even if the landlord had no obligation to furnish heat "as long as the utility was supplying it" the obligation arose when the Power Company's services

ceased. The evidence was "we didn't want to have *any* obligation to furnish heat." (Emphasis added.) And the landlord's agreement to install the meter is another indication of the intention of the landlord not to assume an obligation for heating that did not exist under the prior lease. Finally we see no merit in the contention that the District Court erred in refusing to find that the installation of the heating unit came within Article 22[4] of the lease so as to impose on the landlord the cost of complying with the order permitting a discontinuance of the steam service. The District Court properly found that there was no order directing either party here to install the unit.

Since we think the conclusion of law based on the inferences from the undisputed facts is not erroneous, we are of the opinion that the court did not err in refusing to apply the decision in *Kaufman* v. *Shoe Corporation of America*, 24 Ill. App. 2d 431, 164 N.E. 2d 617 (1960), a "first impression" case, in favor of Woolworth in the case at bar. Woolworth's principal reliance is upon that case.

In view of the District Court's inferences and conclusions, there is little essential similarity between that case and this. There a landlord sought to impose on tenant the cost of installation of a heating unit made necessary by the permissive order of the Illinois Commerce Commission that the Illinois Power Company could discontinue service. The Illinois Appellate Court reversed a judgment for the landlord, on the ground that installation of the heating

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[4] Article 22 provides in part: "The Landlord agrees that if any federal, state or municipal government or any department or division thereof * * * has ordered or required or shall hereafter order or require any rebuilding, alteration or repair thereof or installation therein, the Landlord will immediately at Landlord's own cost and expense rebuild or make such alterations, installations and repairs as may be necessary to comply with such laws, orders or requirements. * * *"

equipment, under a proper construction of the lease, was not the tenant's obligation. The rule applied in Kaufman was that a tenant's lease obligation to repair does not cover structural or substantial alterations or additions made necessary by extraordinary or unforeseen events not in contemplation of the parties at the time of leasing; and that the landlord is ordinarily liable for those substantial alterations or additions.

It is important to note that the Kaufman rule was established where there was no expressed or implied intention of the parties on the heating subject in question. The court there was restricted to the confines of the lease itself and there was no testimony of preliminary negotiations. There was no evidence of intention and no basis for inferring that the parties had ever contemplated that the question would arise. The essential distinction between Kaufman and the case at bar is that here we have evidence and findings of the intention of the parties. The testimony here shows that the landlord contemplated having no obligation for future heating and stated that an obligation to repair the heating plant was "unacceptable." This embraced any future event, and Woolworth knew it, or should have known it at the time the lease was made. We cannot read the Kaufman case as making it incumbent upon the landlord to expressly exempt himself in the lease from such a liability where there is substantial evidence of intention. This substantial evidence renders the rule of ordinary liability of the landlord in that case inapplicable.

We have considered all points and arguments necessary for our decision. We hold that the District Court was correct in deciding that the landlord had no obligation to pay for the heating plant.

For the reasons given, the judgment is affirmed.

SWYGERT, *Circuit Judge* (dissenting).

In *Kaufman* v. *Shoe Corp. of America*, 24 Ill. App. 2d 431, 164 N.E. 2d 617 (1960), as in the present case, the leased premises had been heated by steam purchased by the tenant from the Illinois Power Company. After the utility notified the parties that it was going to discontinue steam heat service, the parties installed a heating unit subject to judicial determination whether it was the obligation of the landlord or the tenant to pay for the installation. There was no lease provision as to heat. The lease did provide that the tenant was to keep the premises in good repair; however, it specifically exempted the tenant from making any structural repairs. The court ruled that where a tenant agrees merely to repair, he does not bind himself to make future additions of a structural nature made necessary by unforeseen future events not within the contemplation of the parties when the lease was made. The burden of these unforeseen expenses falls ordinarily on the landlord.

In holding the landlord in Kaufman liable for the cost of the heating plant made necessary by the Power Company's action, the court went on to say:

> "A general covenant of the tenant to repair, or to keep the premises in repair, merely binds him to make the ordinary repairs reasonably required to keep the premises in proper condition; it does not require him to make repairs involving structural changes. *In order to shift on the tenant a burden which would naturally fall on the landlord, the warrant for the change should be plainly discoverable in the lease.*" (Emphasis supplied.)

Since we are bound under *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to follow Illinois decisional law, the pertinent question is whether the facts in the present case are legally distinguishable from Kaufman.

Before discussing the facts, however, a further observation seems appropriate. It is my view that the rule laid down in Kaufman should not be given the narrow interpretation which the Court here seems to give it. I see the rule as having a much broader application and would hold that the requirement of the rule that "the warrant for the change should be plainly discoverable" applies with equal force to any evidence admitted at trial relating to the intention of the parties.

Although there is a clause in the lease involved in the present case that obligates Woolworth to purchase and pay for the steam it uses for heating and which required the landlord to install a meter, there is no express provision that indicates who has the obligation to install a heating unit. It is evident from the record that in the negotiations of the parties prior to the execution of the lease the real bone of contention was whether the landlord or the tenant should purchase the steam from the Power Company. Woolworth wanted the landlord to purchase the steam from the utility and supply heat to Woolworth at Woolworth's expense. The landlord objected. Woolworth acceded to the landlord's view and agreed to contract directly with the Power Company.

The fact that the provision in the original draft of the lease requiring the landlord to make repairs to the heating plant was deleted from the final draft at the insistence of the landlord does not, in my opinion, justify an inference that the parties intended that Woolworth was to install a heating plant. Kaufman recognizes that an obligation to repair, strictly speaking, has nothing to do with the installation of a new structural addition. This requirement in the printed original draft was obviously superfluous and inappropriate since there was no heating plant in the building at the time the lease was made.

Similarly, the printed provision in the original draft of the lease requiring the landlord to furnish heat at a fixed temperature during seven months of each year was superfluous and inappropriate since the landlord had no control over the supply of steam being used. Naturally the landlord did not want to guarantee heat when he had no control over its supply. But this does not mean that it was understood by the parties that, should the Power Company discontinue service, the landlord would have no obligation to furnish another source of heat as distinguished from furnishing the heat itself. Therefore, the deletion of this provision does not give rise to an inference that Woolworth was to install a heating plant should unforeseen circumstances require this structural addition to the premises.

The District Court buttressed its finding of the requisite intent by referring to Article 15 of the lease in which Woolworth was authorized to make such alterations, additions, and changes to the premises as it deemed necessary. Reference to pertinent parts of this article shed light on how it should be interpreted so as to ascertain the true intention of the parties.

The first portion of Article 15 reads:

> "Within thirty (30) days from the delivery of this lease, the Tenant agrees *to proceed with reasonable diligence at its cost and expense, to make such alterations, additions and changes* to the demised premises as it deems necessary or convenient *to fit the same for its occupancy,* included but not limited to the following, remove second, third, and fourth floors of that portion of the premises at 11-13 W. Main Street, formerly known as the Milner Hotel property, converting the same to a one-story and basement building; remove partitions on the ground floor converting the entire demised premises into a single enlarged salesroom,

> extending the ground floor and basement into the present light court areaway; furnish and install year-round air conditioning and ventilation; furnish and install new store fronts across the front of the ground floor of the demised premises with stainless steel entrance doors, all in accordance with Tenant's plans and specifications * * *." (Emphasis supplied.)

The lease was signed on July 1, 1953. The Illinois Power Company did not notify Woolworth until June 17, 1957 that it had been granted permission by the Illinois Commerce Commission to discontinue heating service in Danville effective June 1, 1960. In order to operate its business, Woolworth had to make structural changes to the burned-out portions of the building and also had to *fit the same for occupancy.* It is evident that the only intention expressed in this article is that the construction work necessary to permit Woolworth to occupy the premises as a store was to be performed at Woolworth's expense and for this the landlord was to reimburse Woolworth. This work had to be carried out before the store was suitably fit for occupancy. Woolworth was to proceed with "reasonable diligence" to complete the work and:

> *"Upon completion of such alterations, additions and changes and the opening of Tenant's store for business in the entire demised premises, the Landlord agrees within fifteen (15) days after demand therefore, to reimburse the Tenant* in the amount of One Hundred Forty Thousand ($140,000.) Dollars, toward the cost of such work." (Art. 15.) (Emphasis supplied.)

Clearly, this article anticipated only such structural changes as were necessary to fit the premises for occupancy. It is uncontradicted that for many years after occupancy a furnace was not needed since a public utility was supplying the heat. I fail to see how this article,

limited as it is as to time, can show intention as to who was to have the burden of installing a furnace should future events make such installation necessary.

It is admitted that neither party during the course of the negotiations referred to the possible cessation of service by the Illinois Power Company. It is also admitted that Woolworth never stated that it would install a heating unit if one became necessary. Furthermore, it is noteworthy that Woolworth made no provision in its design specifications for future installation of a furnace in the renovated building. Finally, there is no evidence that Woolworth was aware of the rumor that the Illinois Power Company was going out of business. If this rumor was in the mind of the landlord, it was never the subject of the negotiations which the parties had prior to the execution of the lease.

The District Court relied solely on inferences gleaned from the nuances of language in the lease provisions and the prior negotiations of the parties in finding a mutual intention that Woolworth is obligated to install the heating plant. These inferences, in my opinion, are far too tenuous to warrant a determination, implicit in the finding, that the shift of the landlord's burden to the tenant is "plainly discoverable" either in the lease itself or in the prior negotiations of the parties.

In applying the rule of Kaufman, which I think is necessary, I fail to see how the defendant in the instant case carried its burden of showing that the parties intended plaintiff to assume the normal obligation of the landlord to make a major structural addition to the leased premises. Accordingly, I believe the District Court's finding as to the intention of the parties is clearly erroneous.

For these reasons I respectfully dissent. I would reverse.

APPENDIX B

Opinion of the United States District Court for the Eastern District of Illinois filed January 10, 1962. The opinion is not reported.

OPINION BY THE HONORABLE CASPER PLATT.

This is an action by F. W. Woolworth, lessee, against Henri A. Meis, Trustee, owner, to recover $14,065.48, which was the amount expended by it to install a heating plant in the leased premises.

The parties introduced evidence of the circumstances and negotiations leading to the execution of the lease. Prior to 1953 F. W. Woolworth leased the first floor and basement of a four story building on Vermilion Street in Danville, Illinois, for a retail variety store. Included in the lease was the connecting basement in the Milner Hotel building on Main Street which connected in an "L" shape on the rear of the Vermilion Street location. The premises were heated by steam furnished by the Illinois Power Company. The amount of steam used by the plaintiff was measured by a common meter and Meis billed Woolworth monthly for an agreed percentage of the heating cost.

A fire destroyed the Milner Hotel building in March, 1953. Shortly thereafter negotiations started for a new lease which was to include the rebuilt Milner Hotel and the Vermilion Street site. Mr. Thorpe, who was superintendent of real estate for F. W. Woolworth in its Chicago office, was the principal negotiator for Woolworth. The territory of the Chicago office included the major portion of Illinois, Indiana and Michigan, and it contained over two hundred (200) Woolworth stores. The negotiations

were conducted for the defendant by Mr. Henri A. Meis, Mr. Horace E. Gunn, his attorney, and Mr. Raymond Rose, an accountant and attorney employed by Meis Bros. Mr. Edwin H. Anderson participated in a part of the negotiations as superintendent of construction for Woolworth.

The lease on the premises was finally executed by the parties as of July 1, 1953, for a term commencing July 1, 1953, and ending on April 30, 1978, with an option on the part of Woolworth to renew for an additional ten years at an annual minimum rental of $32,500.00.

The Illinois Power Company was furnishing steam heat for the premises and on June 17, 1957, notified the plaintiff that it had been granted permission to discontinue
61 heating service in Danville, Illinois, effective June 1, 1960, by the Illinois Commerce Commission. This required the installation of the controversial heating plant to make the premises suitable for use as a retail store.

Paragraph 12 of the complaint which is admitted by the answer sets forth:

> "Pursuant to written stipulation of the parties dated July 6, 1960, it was agreed that, since the plaintiff and defendant were in dispute as to who had the obligation of installing the new heating unit, plaintiff would proceed to install a new heating system prior to the heating season which would commence approximately September 15, 1960 and advance the cost thereof, with the understanding that said installation would be without prejudice to the right of plaintiff to seek reimbursement from the defendant for the cost of said installation, and without prejudice to the right of the defendant to claim that he was not liable for such cost."

The preliminary draft of the lease submitted by Thorpe contained:

"Art. 19. The Landlord agrees at Landlord's expense to furnish to the demised premises sufficient heat during Tenant's usual business hours to maintain therein a temperature of 72° from September 15th until May 15th of each year. The Tenant agrees to pay Landlord monthly for such heat at the usual rate established by the local utility supplying such heat."

62 Meis refused to accept such a clause. Rose testified that at a meeting with Thorpe "we said we would not agree to that; that it was objectionable to us, that we didn't want to have any obligations to furnish heat." Thorpe redrafted the lease but failed to modify this Article. His attention was again called to the objection by Gunn and he submitted the modification which reads:

"Art. 18. • • •

"The Landlord agrees at Landlord's expense to install and connect an adequate separate meter for the purpose of measuring all steam for heat consumed by the Tenant in the demised premises. The Tenant agrees to purchase and pay for the steam indicated by said meter to have been consumed by the Tenant from the public utility to which the demised premises are connected."

Woolworth would ignore the change in this Article, and give no effect to the omission "to furnish to the demised premises sufficient heat. . . ." Article 19, as well as Article 18, provided that Woolworth was to pay for the heat. Rose expressly stated the reason for the modification was to eliminate the obligation to furnish heat. Thorpe did not appear at the trial. The change in the wording of this Article and Mr. Rose's statement should have made Thorpe aware that Meis would not be obligated to furnish heat.

63 There was also a change from the original draft of the lease in Article 20, which read:

> "Art. 20. The Landlord agree[d] to make and pay for all repairs, structural or otherwise, to the exterior of the building . . . of which the demised premises are a part, including but not limiting said repairs to the streets, curbs, sidewalks and alleys, and also to make and pay for all repairs to the interior of said building which may be of a structural nature . . . and also to make and pay for all necessary repairs *to the heating plant* and such other repairs,', structural or otherwise. . . ." (Emphasis supplied.)

Defendant's Exhibit 4, being a letter from Thorpe to Meis, states:

> "In Article 20, delete 'streets, curbs and alleys' in the third line, and in the 5th and 6th line, delete '*to the heating plant* and such other repairs,' and adding the end of paragraph 2 from the premises owned or controlled by the Landlord." (Emphasis supplied.)

From this quotation, coupled with the change in the provision to furnish the heat, Woolworth knew or should have known that Meis was not going to be bound to furnish heat if it became necessary due to the discontinuance of steam service by the Illinois Power Company.

64 It must have been known to both parties that the Illinois Power Company, as a public utility, was controlled by the Illinois Commerce Commission. It could permit Illinois Power Company to discontinue an unprofitable part of its business. Neither Woolworth nor Meis could control this situation. Meis testified that there was a "well-founded rumor" in Danville that the Illinois Power Company might discontinue the steam heat service in Danville, but specifically this was not mentioned in the negotiations. Since Thorpe and the manager of the Woolworth store failed to appear as witnesses, the evidence does not disclose whether Woolworth knew of this rumor.

No explanation was offered by Woolworth as to why its store manager and Thorpe did not testify that they had no knowledge of the rumor, and the presumption could be that one or both of them knew of the rumor. Cf. *Morris* v. *Pennsylvania R. Co.*, (1956) 10 Ill. App. 2d 24, 33. Thorpe was not naive in negotiating leases. He was the superintendent of real estate for Woolworth and leasing premises was his business. Whether Woolworth knew of the "well-founded rumor," it should have known that the Illinois Power Company could discontinue furnishing heat with the consent of the Illinois Commerce Commission.

65 Another important provision of this lease relative to the issues in this case is:

"Art. 15. Within thirty (30) days from the delivery of this lease, the Tenant agrees to proceed with reasonable diligence at its cost and expense, to make such alterations, additions and changes to the demised premises as it deems necessary or convenient to fit the same for its occupancy, included but not limited to the following, remove second, third, and fourth floors of that portion of the premises at 11-13 W. Main Street, formerly known as the Milner Hotel property, converting the same to a one-story and basement building; remove partitions on the ground floor converting the entire demised premises into a single enlarged salesroom, extending the ground floor and basement into the present light court areaway; furnish and install year-round air conditioning and ventilation; furnish and install Magnesite Terrezzo floor and, fluorescent lighting in the ground floor sales area, and furnish and install new store fronts across the front of the ground floor of the demised premises with stainless steel entrance doors, all in accordance with the tenant's plans and specifications and subject however to all applicable, Federal and State Municipal Laws and Regulations and in compliance therewith. Anything herein to the contrary notwithstanding, the Landlord agrees

that the Tenant may in its sole discretion before commencing or during the course of such work postpone or delay the same when in the opinion of the Tenant suitable labor and materials are not available from its customary sources in sufficient quantities to permit the orderly and continuous performance of such work to completion, provided however that Tenant shall proceed with such work when in its opinion such labor and materials become so available.

66 "Upon completion of such alterations, additions and changes and the opening of Tenant's store for business in the entire demised premises, the Landlord agrees within fifteen (15) days after demand therefore, to reimburse the Tenant in the amount of One Hundred Forty Thousand ($140,000.) Dollars, toward the cost of such work."

Thus, it was Woolworth's obligation to "fit" the demised premises for its occupancy, with no control by Meis as to what "alterations, additions and changes" were to be made. Meis was not required to do anything to make the premises tenable for Woolworth, except that upon completion of the "alterations, additions and changes," and within fifteen days after demand was made, to pay $140,000.00 toward the cost of the work. The lease was for a term of twenty-five (25) years, with an additional ten (10) years at the option of Woolworth. Woolworth knew that during the period of its tenancy it would require the premises to be heated. Meis had refused to be obligated to furnish heat. If Illinois Power shut off its service a heating plant would be a necessity. Under Article 15, Woolworth accepted the premises in the condition that existed after fire had destroyed the Milner building, and agreed to "fit" the premises for its occupancy during the term of the lease.

67 The lease included the entire Milner building when rebuilt, the ground floor and basement of the Vermilion

Street site, except the two entryways to the three upper floors. (Schedule A-1 of the lease.) Anderson testified that he prepared the plans and specifications for Woolworth, and that the heating plant was installed in the incinerator room; that this space was made available because the city of Danville refused to permit the installation of an incinerator. Meis, although he still had the three floors above the ground floor on Vermilion Street, had no right to install a heating plant in the demised premises under the terms of the lease. It seems obvious that had Meis intended to be obligated to install a heating plant in the basement he certainly would have reserved a space in the demised premises for the heating plant.

Woolworth contends that the facts in the instant case are similar to the facts in *Kaufman* v. *Shoe Corporation of America*, (1960), 24 Ill. App. 2d 431, and that this Court should follow the decision in that case. In the *Kaufman* case, the premises were rented for twenty-five (25) years commencing July 1, 1952. The lease was executed in 1949. At the time the lease was executed the premises were heated by steam furnished by Illinois Power Company. The cost of the steam was paid by the tenant.
68 The Illinois Power Company was permitted in 1958 to discontinue furnishing steam in Champaign, Illinois, where the premises were located. The landlord installed the heating plant and was attempting to recover the cost of installation from the Shoe Corporation, the tenant. The trial court held the tenant was obligated under the lease to install a heating plant, and if a chimney or flue were required, the landlord should pay for these structural changes. The lease required the tenant to keep the buildings and improvements in good repair, but did not obligate the tenant to make any structural repairs. The landlord contended, that based upon the tenant's covenant to repair, it was required to install the heating plant. The

Appellate Court reversed the trial court, and held that the landlord was obligated under the lease to pay the entire cost of the heating plant. At page 435 the Appellate Court said:

> "Certain fundamental principles aid us in determining the question before us. An express covenant to repair will not be enlarged by construction. *Hollywood Bldg. Corp.* v. *Greenview Amusement Co.*, 315 Ill. App. 658, 43 N.E. 2d 566. Where the parties to a lease of real property have expressly covenanted as to repairs, the express covenant takes the place of any implied covenant and becomes the measure of liability of the respective parties. A general covenant of the tenant to repair, or to keep the premises in repair, merely binds him to make the ordinary repairs reason-
69 ably required to keep the premises in proper condition; it does not require him to make repairs involving structural changes. In order to shift on the tenant a burden which would naturally fall on the landlord the warrant for the change should be plainly discoverable in the lease. 51 C.J.S., Landlord and Tenant, Sec. 368.
>
> "Where a tenant covenants merely to repair and the alterations or additions to the premises are of a structural or substantial nature and are made necessary by extraordinary or unforeseen future events not within the contemplation of the parties at the time the lease was executed, the landlord is ordinarily held liable for such alterations or additions."

This Court is of the opinion that *Kaufman* v. *Shoe Corporation of America, supra,* is not persuasive here. In the instant case the terms of the lease were different from the terms of the lease in Kaufman. Furthermore, the parties introduced in evidence the condition of the premises before the lease was executed, and the negotiations leading to the final draft of the lease. No such evidence appears in the *Kaufman* case. The instant case is clearly distinguishable on the facts and terms of the lease, and in particular Article 15, wherein Woolworth covenanted to

make structural "alterations, additions and changes." It is not a situation where the tenant merely covenanted to repair and where "the landlord is ordinarily held liable for such alterations or additions."

70 Woolworth further contends that Article 22 of the lease should be construed as a covenant on the part of the defendant to install a heating plant. Article 22 provided in part as follows:

> "The Landlord agrees that if any federal, state or municipal government or any department or division thereof has or hereafter shall condemn the building of which the demised premises are a part as unsafe or as not in conformity with the laws and regulations relating to the use, occupation and construction thereof, or has ordered or required or shall hereafter order or require any rebuilding, alteration or repair thereof or installations therein, the Landlord will immediately at Landlord's own cost and expense rebuild or make such alterations, installations and repairs as may be necessary to comply with such laws, orders or requirements. . . ."

There was no governmental order directed to either Woolworth or Meis which required a heating plant, nor was there any particular kind of fuel ordered to be used, as was the order in *Belmont Hotel, Inc.* v. *New Jersey Title and Guaranty Co.*, (1945), 132 N.J.L. 403, 40 Atl. 2d 778. The order of the Interstate Commerce Commission could go no further than to permit the Illinois Power Company to discontinue furnishing steam.

The Court in determining the issue in this case has reviewed the pertinent provisions of the lease in order to construe the lease, and to carry out the intention of the parties. The primary object in construing the lease is to determine and give effect to the intention of the
71 parties. *Sixty-Third & Halsted Realty Co.* v. *Goldblatt*, (1951), 342 Ill. App. 389. The parties have aided the

Court by offering in evidence, without objection, parole evidence of the circumstances at the time the lease was executed, and the negotiations leading to the execution of the lease in its final form. The Court has given weight to these circumstances and negotiations, and has placed itself in the position of the parties at the time of the negotiations. There was deleted from the original draft of the lease the provisions that Meis would furnish heat and repair the heating plant. Such omissions are of importance in ascertaining the intention of the parties when considered with the particular article which appears in the lease. *Szulerecki* v. *Oppenheimer*, 1918, 283 Ill. 525, 532. Moreover, if it had been intended that Meis would install a heating plant the parties would have reserved space by the terms of the lease for its installation. When Article 15 of the lease is considered, the intention of the parties becomes more obvious. In Article 15 Woolworth agreed "to make such alterations, additions and changes to the demised premises as it deem[ed] necessary or convenient to fit the same for its occupancy, included but not limited" to certain improvements "in accordance with [its] plans and specifications," and Meis agreed "to reimburse [Woolworth] in the amount of One Hundred Forty
72 Thousand ($140,000.00) Dollars, toward the cost of such work." The improvements cost $143,615.00. It is a logical conclusion, based upon all the evidence and the terms of the lease, that the lease should be construed to obligate Woolworth to install and pay for the heating plant in the event it became necessary to make the premises suitable for its occupancy.

This opinion may serve as findings of fact and conclusions of law. Final judgment in accordance herewith will be entered.

Dated this 10th day of January, 1962.

APPENDIX C

Opinion of the Appellate Court of Illinois, Third District, in *Ethel B. Kaufman v. Shoe Corporation of America, an Ohio corporation,* filed February 18, 1960, reported at 24 Ill. App. 2d 431, 164 N.E. 2d 617:

JUDGE ROETH DELIVERED THE OPINION OF THE COURT.

This is a declaratory judgment action to declare the rights of the parties under a written lease. There is no factual dispute and the questions involved are presented by the pleadings.

In October, 1949, the plaintiff and defendant entered into the lease here in question, by which plaintiff leased certain premises in the City of Champaign, for use as a store, to the defendant for a period of 25 years commencing on July 1, 1952, and ending on June 30, 1977. The specified rental for the term was $500,000 payable at the rate of $20,000 per year in equal monthly payments. At the time this lease was executed the building was heated with steam furnished by and purchased from Illinois Power Company. The steam was brought to the building by Illinois Power Company and then circulated through the building by means of radiators and other fixtures. Cost of the steam was paid for by the tenant. In 1958 the Illinois Power Company obtained authority from the Illinois Commerce Commission to discontinue the steam heat service in Champaign. The Illinois Power Company then notified the plaintiff and defendant that as of May 1, 1959, it would discontinue furnishing steam for heating purposes. Such action by the power company made necessary the installation in the building of some type of heating equipment if the building were to be continued to be used as a store building. The trial court held that the duty to install the

heating equipment devolved upon the defendant, except that if a chimney or flue was required, these items constituted structural changes, the cost of which should be borne by the plaintiff. Upon oral argument of this case in this court, it was disclosed by counsel that because of the exigencies of the situation, the heating equipment had been installed under an agreement that liability of the plaintiff or defendant for the cost thereof would abide the outcome of this case. The basic question is whether the tenant is obligated to install this heating equipment under the terms of its lease. Both counsel agree that the question here presented is without precedent in Illinois.

The provisions of the lease which it is contended bear upon a solution of this problem are as follows:

"The Lessee further agrees that neither the demised premises nor any building at any time situated thereon, or any part thereof, shall be used for any unlawful purpose, or for any purpose in violation of any lawful regulation, and that during the said term the demised premises, and every part thereof, and the buildings and improvements thereon, shall be kept by the Lessee in good repair, and in a clean, wholesome, insurable and rentable condition, and that all health and police regulations in all respects, and at all times, shall be fully complied with by the Lessee, and that all sidewalks and areas in front and in the rear of said premises shall be kept by the Lessee safe, secure and conformable to all lawful requirements, provided, however, that the Lessee shall not be required to make any structural repairs and the Lessee agrees to save and keep harmless the Lessor at all times against any loss, damage, costs or expenses which may be occasioned by any failure of the Lessee to comply with any of the provisions of this lease, or which may result from any accident or injury or damage to person or property,

and happening or done in, upon or about the demised premises, or resulting from any act or thing done or omitted to be done upon said premises, or any building at any time situated thereon, or which may be due to any use or occupancy which may be made thereof."

[1] It is first contended that the obligation on the part of the defendant to install the heating equipment is covered by the provision above, by which the lessee covenants to keep the premises in good repair. The word repair in this clause has its ordinary meaning as given in Funk & Wagnall's New Standard Dictionary, to-wit: restoration after decay, waste, injury or partial destruction; supply of loss; reparation. It does not include alterations or additions. *Hacken* v. *Isenberg*, 288 Ill. 589; 124 N.E. 306. The word "repair" involves the idea of something pre-existing and presupposes something in existence to be repaired, or the existence of the thing to be repaired. 76 C. J. S., p. 1170, (Repair.) Applying these definitions to the words "repairs" and "structural repairs" as contained in the foregoing clause, it would initially appear that under a strict construction, the installation of new heating equipment could not be classified as either a "repair" or "structural repair." If a thing cannot be classified as a "repair" in the ordinary sense it would follow that it could not be a "repair" in the specific sense of being designated as "structural."

[2-4] Certain fundamental principles aid us in determining the question before us. An express covenant to repair will not be enlarged by construction. *Hollywood Bldg. Corp.* v. *Greenview Amusement Co.*, 315 Ill. App. 658, 43 N.E. 2d 566. Where the parties to a lease of real property have expressly covenanted as to repairs, the express covenant takes the place of any implied covenant and becomes the measure of liability of the respective parties.

A general covenant of the tenant to repair, or to keep the premises in repair, merely binds him to make the ordinary repairs reasonably required to keep the premises in proper condition; it does not require him to make repairs involving structural changes. In order to shift on the tenant a burden which would naturally fall on the landlord, the warrant for the change should be plainly discoverable in the lease. 51 C. J. S., Landlord and Tenant, Sec. 368.

[5] Where a tenant covenants merely to repair and the alterations or additions to the premises are of a structural or substantial nature and are made necessary by extraordinary or unforeseen future events not within the contemplation of the parties at the time the lease was executed, the landlord is ordinarily held liable for such alterations or additions. In *Ingalls* v. *Roger Smith Hotels Corporation*, 143 Conn. 1, 118 Atl. 2d 463, the lessor leased premises for hotel purposes for a 14-year term. The lease provided that the lessee covenanted to keep the interior and exterior of the demised premises in adequate, proper and satisfactory repair at the expense of the lessee, provided the lessee shall be under no obligation to make structural alterations or repairs. Some 4 years after the execution of the lease the General Assembly authorized the state fire marshal to establish a fire safety code. Pursuant to this authority the fire marshal prepared a code and subsequently notified the hotel that some 17 items of work were necessary if the hotel was to comply with the code. The largest single item was the installation of an automatic sprinkler system throughout the hotel. The question arose in this case as to who should be required to pay the cost of the work. The court held that the work did not fall within the tenant's covenant to repair and without passing upon the obligation of the landlord under the provision above noted as to structural alterations or repairs, held the landlord liable noting "the court erred in imposing

upon the defendant (tenant) the duty of paying for any of these items, since *the lessee is not required to absorb the cost of creating something new.*" (emphasis supplied.)

In *Belmont Hotel, Inc.* v. *New Jersey Title Guarantee & Trust Co.*, 132 N.J.L. 403, 40 Atl. 2d 778, the lease was for 10 years, and provided that the tenant was to make all repairs and deliver up the premises at the expiration of the term in good condition, reasonable wear and tear and damage by the elements only excepted.

The heating plant burned fuel oil. Subsequent to the execution of the lease and during the war period, because of a scarcity of fuel oil, federal authorities ordered conversion to coal as fuel which required the installation of new heating equipment. In making the conversion it became necessary to make certain changes, to install storage bins, coal chutes and an automatic stoker and it was necessary to employ an engineer and contractor. The landlord refused to make the changes, and the tenant had them made and sued the landlord to recover the cost.

The court held that the landlord was liable for the cost of the changes. It said:

"The learned trial court concluded that the conversion of the heating system from fuel oil to coal burning did not constitute a repair or maintenance within the meaning of the lease, which was the tenant's obligation, but was a structural change, the obligation for which was the landlord's. We concur with that view."

In *Herald Square Realty Co.* v. *Saks & Co.*, 215 N.Y. 427, 109 N.E. 545, an owner of premises, pursuant to an agreement, erected a building for a prospective tenant, for use as a department store. The plans, which indicated a slight projection of display windows beyond the building

line into street lines, were approved by the commissioner of buildings. At the time the plans were approved and for many years prior thereto it was the policy and common practice of the authorities to permit and sanction such slight projections of buildings beyond building lines. After the erection of the building a 20 year lease was entered into. The lease provided that the tenant would keep "the demised premises and every portion thereof, inside and outside, . . . in good order, condition and repair." Some 8 years after the execution of the lease there was a change of municipal policy and the parties to the lease were directed to remove the encroachment. The question involved was whether the landlord or tenant should bear the cost of this removal. In holding that the landlord should bear the cost of removal, despite the provisions of the lease aforesaid, the court observed:

"Here the tenant is sought to be charged with the expense of making an important and permanent structural change in the building occupied by him. *This burden is one that usually falls upon the owner,* and if it is to be shifted to the tenant the warrant for the change should be plainly discoverable in the lease. We can find in the lease no indication that this was the intention of the parties, . . . The language of this lease, construed in the light of contemporaneous regulations, usages, and customs, seems to require the conclusion that it was not the purpose of the parties to subject the tenant to an expense caused wholly by extraordinary and unforeseen building alterations made necessary by a subsequent and radical change in the policy of the municipal government, and we are brought to this conclusion despite the forceful argument of counsel for the plaintiff, in which he contends that the expense of complying with the order of the borough president, directing the removal of the show windows, comes within the very letter of the lease. We think that this

extraordinary expense was not in the contemplation of the parties when this lease was made." (emphasis supplied.)

[6] Attention is called to an annotation in 33 A. L. R. 530 and supplements thereto in which similar cases may be found holding that comparable additions or changes do not fall within a tenant's covenant to repair. From the foregoing we conclude that the covenant of the defendant, in the case at bar, to keep the premises in repair, does not obligate it to pay the cost of the heating equipment.

It is contended that the provision requiring the defendant to keep the premises in a rentable condition is broad enough to obligate the defendant to install the heating equipment. But this provision must be considered in connection with the language that precedes it. We are of the opinion that the proper construction is that the tenant is required to make such repairs as will keep the premises in a rentable condition, that is, the ordinary repairs reasonably required to keep the premises in proper condition and prevent waste and decay.

[7] Plaintiff seizes upon the language above, to-wit: "and the Lessee agrees to save and keep harmless the Lessor at all times against any loss, damage, costs or expenses . . . resulting from any act or thing done or omitted to be done upon said premises, or any building at any time situated thereon," and contends that the heating facilities are an expense occasioned or resulting from a thing done upon said premises. This contention takes the language out of its true context. When the whole clause is considered it is apparent that what is intended is an indemnification of the lessor against loss caused by default of the lessee or by reason of any accident occurring upon the premises, whether through active negligence or careless omission.

We are therefore of the opinion that the trial court erred in construing the lease in question to require the defendant tenant to furnish the heating equipment. The order should have required the plaintiff to install the heating equipment and any chimney, flue or other structure necessary to properly operate the same.

Accordingly the judgment of the Circuit Court of Champaign County is reversed and the cause is remanded with directions to enter a judgment in accordance with this opinion.

Reversed and remanded.

REYNOLDS, P. J. and CARROLL, J., CONCUR.